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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE HART ARMSTRONG,

Defendant and Appellant.

F064006

(Super. Ct. No. MCR033374)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. David D. Minier, Judge. (Retired judge of the Madera Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French, Michael A. Canzoneri and Heather S. Gimle, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Bruce Hart Armstrong was convicted of numerous crimes related to two incidents of domestic violence between himself and his wife, Sunshine Armstrong.¹ Several enhancements were also found true, resulting in a lengthy prison sentence. Armstrong's primary contention is that the prosecutor committed numerous acts of misconduct requiring reversal of the judgment. We find only a single instance of misconduct, but conclude Armstrong did not suffer any prejudice. However, we agree the trial court improperly imposed a two-year enhancement pursuant to Penal Code section 12022.1, subdivision (b), and will order that enhancement stayed as required by subdivision (d).² We affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL SUMMARY

The information contained 10 counts charging Armstrong with various crimes.³ The jury found Armstrong guilty on some charges, not guilty on others, could not reach a verdict on another charge, and guilty of a lesser included offense on several charges. We will discuss separately the charges, evidence, and verdict for each incident.

Incident of April 13, 2009

Sunshine refused to testify at trial, even after the trial court held her in contempt. Sunshine had been made aware of Code of Civil Procedure section 1219, subdivision (b), which prevented the trial court from punishing Sunshine by imprisonment for her contempt. Accordingly, the trial court concluded Sunshine was unavailable within the meaning of

¹ We will refer to Sunshine Armstrong as Sunshine, not out of disrespect, but to ease the reader's task. The record also contains references to Sunshine as both Armstrong's wife and his ex-wife. We will simply refer to Sunshine as Armstrong's wife, while recognizing the lack of clarity in the record.

² All statutory references are to the Penal Code unless otherwise stated.

³ In counts 11 and 12, the information charged Armstrong with two counts related to a different incident, occurring in 2008. The trial court entered a judgment of acquittal as to these two counts after granting Armstrong's section 1118.1 motion. It also struck all of the testimony related to these two counts.

Evidence Code section 1291, subdivision (a)(2), and permitted the prosecution to enter into evidence Sunshine's testimony from the preliminary hearing.

Sunshine testified at the preliminary hearing that Armstrong came to her place of employment at the North Fork Rancheria to speak with her on April 13, 2009. As Sunshine exited the security door to get into the lobby, Armstrong grabbed her by the neck and pushed her into the wall. Armstrong said he was going to kill her. Sunshine told Armstrong she could not breathe, and he eventually let go of her neck. She was afraid she would be killed, but agreed to go outside and talk with Armstrong if he would calm down. Sunshine attempted to get the attention of other employees, but Armstrong told her to stop trying to do so or he would kill her. Armstrong was surprised when Sunshine's supervisor, Jody Jeffers, came outside to ask if there was a problem. This interruption allowed Sunshine to reenter the building. She went into her boss's office with another coworker. Sunshine heard someone pound on the door. When the door broke open, Armstrong entered the office and swung at her. Someone was attempting to restrain Armstrong, so Sunshine ran into a closet, which had a heavy metal door, and locked the door. Sunshine did not see Armstrong again that day. She suffered bruising and scratches on her neck.

Jeffers was one of Sunshine's supervisors on April 13, 2009. On that date, Jeffers received a call to come to the front of the building. When he arrived, Jeffers saw Sunshine and Armstrong talking together just outside the building on a deck. Jeffers went outside and asked if there was a problem. Armstrong began talking to him, while Sunshine immediately returned inside the office. Armstrong then appeared to leave. Jeffers went inside the building to speak with Sunshine. He responded to a commotion in the front lobby to discover Armstrong had returned. Armstrong was upset and loud, so Jeffers asked him to leave. Instead, Armstrong jumped over the receptionist's counter and ran toward the office where Sunshine was working. The door was locked, so Armstrong was using his shoulder in an attempt to open the door. He broke open the door, so Jeffers jumped on him and grabbed his waist. Sunshine and two other ladies who were working in the office screamed

and left the office. Jeffers and several other employees were able to subdue Armstrong, and eventually everyone calmed down enough that Jeffers was able to convince Armstrong to leave the building.

Bennie Romiti, a Madera County Deputy Sheriff, was dispatched to the Rancheria on April 13, 2009. When Romiti spoke with Sunshine, she was crying, and appeared to be upset and afraid. Sunshine also had red marks and small scratches on her neck consistent with being choked.

Despite her refusal to testify when ordered to do so by the trial court, Sunshine testified when called by the defense. Her testimony is summarized in detail below. Generally, Sunshine admitted she engaged in an argument with Armstrong at her place of employment, but denied that Armstrong touched her at any time that day. She admitted Armstrong broke into the office, but repeated that he did not touch her.

Armstrong was charged with (1) assault by a means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), (2) infliction of corporal injury resulting in a traumatic condition (§ 273.5, subd. (a)), (3) making a criminal threat (§ 422), (4) intimidation of a witness by force (§ 136.1, subd. (c)(1)), and (5) burglary (§ 459). The jury found Armstrong guilty of (1) the lesser included offense of attempted commission of a violent injury on Sunshine (§ 240), (2) the lesser included offense of unlawfully touching Sunshine in a harmful or offensive manner (§ 242), (3) the lesser included offense of attempting to make a criminal threat (§§ 664 and 422), and (4) burglary of a commercial building (§ 459). Armstrong was found not guilty of intimidation of a witness by force.

Incident of April 16, 2009

Sunshine testified at the preliminary hearing that she attended an ex parte hearing to obtain a restraining order against Armstrong the morning of April 16, 2009. When she arrived at the courthouse, she saw Armstrong parked in his vehicle. Armstrong did not go inside the courthouse and was gone when Sunshine left the courthouse. Later that day,

Sunshine received a phone message from Armstrong asking that she contact him. Sunshine and her children returned home about 6:00 p.m.

Sunshine was in the kitchen washing dishes when she heard a noise in the laundry room. She walked to the laundry room to check out the noise. She found Armstrong in the laundry room with something wood-colored in his hand. Sunshine turned to run away from him, but before she could get away she felt something hit the back of her head. Sunshine started screaming while Armstrong continued to hit her. She put her hands up in an attempt to protect herself. She was also kicking at Armstrong to fight him off. When Sunshine fell to the ground, Armstrong got on top of her and kept fighting with her. Sunshine eventually grabbed the metal part of the hammer and held onto it to protect herself.

Sunshine's daughter, T., came into the laundry room and yelled at Armstrong to stop hurting Sunshine. Armstrong was grabbing at Sunshine's face and his fingers went into her mouth and into her eyes. At one point Armstrong grabbed a pole and put it across Sunshine's neck. That is when Sunshine saw T. hitting Armstrong. Another child was standing in the laundry room watching the fight. Sunshine was eventually able to escape by jumping out a window and running to a neighbor's house. She was "pretty out of it by that point," and there was blood all over her face. She was transported to the hospital and treated for her injuries. She had a broken nose and lots of cuts and bruises on her head.

T., the oldest daughter of Armstrong and Sunshine, testified that on April 16, 2009, she was talking on the phone when she heard her mother screaming for help. T. ran to the laundry room to discover Armstrong leaning over Sunshine. Sunshine was on the ground kicking at Armstrong and Armstrong was on top of Sunshine repeatedly hitting her with a hammer. Sunshine was using her arms to protect her head, and trying to kick Armstrong off of her. Armstrong swung at Sunshine numerous times and did not stop until T. distracted him by getting on his back and grabbing at his face. T. did not see Sunshine strike Armstrong. Armstrong bit down when T. put her hands in his mouth. When T. cried out,

Armstrong unclenched his jaw and turned his attention to T., allowing Sunshine to escape. Armstrong then left.

Scott Raper was one of the paramedics that responded to Sunshine's location on April 16, 2009. Raper noted copious amounts of blood coming from Sunshine's face. Sunshine was posturing, or on her hands and knees with her back arched "like a cat stretching." Posturing is an indication of head trauma. They began preparing Sunshine for transportation. In checking Sunshine, Raper found soft spots on the head, and head wounds with fatty-type substance coming out of them. Sunshine initially did not respond, but her condition improved with treatment. Sunshine told Raper she was attacked by her husband, and he hit her repeatedly in the head with a hammer. She also stated Armstrong put his fingers down her throat.

Police Officer Daniel D. Foss responded to the scene. When he arrived he saw three or four children on the street, one of whom had blood on her clothing. He located Sunshine, several houses away. She was on her back and covered in blood, especially her hair. He saw white matter on her skull he thought might be fragments from her skull. Sunshine told Foss that Armstrong hit her in the head with a hammer. Sunshine was staying at her father's house. When she entered the laundry room of the house, Armstrong jumped out and began hitting her in the head with a hammer. Sunshine ended up on the floor with Armstrong on top of her. She attempted to fend off the blows, and her oldest child (T.) attempted to intervene. Sunshine eventually freed herself from Armstrong and escaped by jumping out of a window.

Foss located a hammer that had been found in a flower bed at the house where he located Sunshine. When he spoke with T., she had blood on her sweater and on her socks. One of the other children also had blood on his socks. Foss found blood on the walls and floor of the laundry room, along with a lot of blood smears, bloody footprints, and bloody hand prints. Pictures of the injuries suffered by Sunshine were entered into evidence.

Madera City Police Officer Shawn Bushey interviewed Armstrong on April 16, 2009. Armstrong stated he did not know where he was that afternoon, and appeared defensive. He had his hands crossed over his chest, and would look down when questions were asked. Bushey noted fresh scratches on the left side of Armstrong's face. Armstrong claimed he got the scratches from shaving. Bushey opined the scratches were not consistent with shaving. Bushey also discovered two scratches on the left side of Armstrong's chest that appeared similar to the scratches on Armstrong's face. Armstrong also appeared nervous and scared.

Sunshine testified at trial that she instigated the incident by striking Armstrong with the hammer after he refused her attempt to reconcile.

For this incident, Armstrong was charged with (1) attempted murder (§§ 664 and 187, subd. (a)), (2) infliction of corporal injury on a spouse resulting in a traumatic condition (§ 273.5, subd. (a)), (3) burglary (§ 459), and (4 & 5) two counts of willful infliction of unjustifiable mental suffering on a child (§ 273a, subd. (a)). The jury could not reach a verdict on the attempted murder charge and found him not guilty of the burglary charge. However, the jury found Armstrong guilty of (1) unlawful infliction of corporal injury which resulted in a traumatic condition (§ 273.5, subd. (a)), (2) one count of infliction of great mental suffering on a child (§ 273a, subd. (a)), and (3) one count of the lesser included offense of attempting to inflict great mental suffering on a child (§§ 664 and 273a, subd. (a)). Several enhancement allegations were found to be true.

Sunshine's Trial Testimony

Before she testified, Sunshine's attorney, Michael McKneely, testified Foss informed him that if Sunshine testified for the defense, she would be arrested as she left the courtroom. McKneely informed Sunshine of this comment.

Sunshine began her testimony by admitting she told the prosecutor she did not want to testify against Armstrong, and when called anyway refused to testify even after the court held her in contempt. She invoked the protection of Code of Civil Procedure section 1219,

subdivision (b) which precludes the court from placing into custody a victim of domestic violence or sexual assault who refuses to testify about the crime. Sunshine also testified she had been informed that she would be arrested if she testified, but she wanted to do so anyway because she wanted to tell the truth.

Sunshine testified her three boys had lived with her until recently, but were removed by Madera County Department of Social Services (MCDSS).⁴ The trial court precluded any further examination into the issue pursuant to Evidence Code section 352. Sunshine's relationship with her daughter had also recently deteriorated. T. told Sunshine she (T.) would do anything to continue living with her grandmother.

By the end of 2008, Sunshine's marriage to Armstrong was in the process of being dissolved. She admitted she told Armstrong she had several affairs during their marriage, and he may not have been the father to one of their children. Armstrong requested Sunshine move out of the home and filed for divorce. Sunshine was upset because she had to give up the material things accumulated during the marriage even though she had worked as hard as her husband to acquire them. Sunshine was left with nothing, and had to work to support herself. She was very upset with Armstrong. She tried to make Armstrong look bad so she could obtain custody of the children and force Armstrong to pay child support.

With regard to the April 13, 2009, incident, Sunshine testified she had been arguing with Armstrong on the phone. During one of the phone calls, Armstrong told her he had discovered with whom she was having an affair. Sunshine went outside to speak with Armstrong when he came to her place of employment. An argument ensued, but no threats were made. Instead, Sunshine threatened Armstrong because she wanted him to leave. Armstrong did not touch her that day.

⁴ Outside the presence of the jury, the prosecutor told the jury she had been informed that MCDSS removed the children because Sunshine had returned to live with Armstrong.

Sunshine explained the marks on her neck by stating she bruised easily, and she starts fidgeting when she is nervous. Her statements to the police were attempts to get even with Armstrong. Sunshine admitted she went into her office when Jeffers came outside. She also admitted Armstrong broke the door and came into the office. Armstrong did not touch her. When an officer interviewed Sunshine, she stated she wanted to press charges because Armstrong had broken through the door. Sunshine was hopeful that doing so would also help her divorce case.

With regard to the April 16, 2009, incident, Sunshine admitted she was at home with the children. Sunshine had called Armstrong earlier that day and asked him to come over so she could apologize to him for everything, including the April 13 incident.

Sunshine knew Armstrong arrived because she heard him enter the house through the door in her bedroom that led outside. She went into her bedroom where she found Armstrong sitting on her bed. She tried to sit in his lap, but he was upset. Sunshine apologized, and told Armstrong she wanted to get back together. Armstrong told Sunshine he was done with the relationship. He got up to leave, but first went through the laundry room into the bathroom. Sunshine followed him into the laundry room.

Sunshine was upset. She found a hammer in the laundry room and confronted Armstrong when he exited the bathroom. Sunshine told Armstrong she wanted to continue their conversation, but Armstrong laughed at her and turned to leave. Sunshine then hit him with the hammer in the left shoulder. Armstrong turned and Sunshine hit him again in the chest causing him to fall backward. When Sunshine went to hit him again, Armstrong kicked her in the face breaking her nose. Sunshine fell backward, hit her head on a hard surface, and dropped the hammer. Sunshine reached for the hammer again. Armstrong got up, got on top of her, and grabbed at the hammer. Sunshine started kicking at Armstrong, swinging the hammer at him, and called for help. T. entered the laundry room to join the fray. Sunshine lost the hammer and escaped as soon as she could. She lied to the police so she would not get into trouble. Armstrong never hit her with the hammer.

Sentencing

The trial court sentenced Armstrong to a term of 29 years and four months, calculated as follows: (1) the aggravated term of six years for the section 273a, subdivision (a) count, doubled to 12 years because of a prior conviction within the meaning of section 667, subdivisions (b) through (i); (2) a consecutive term of two years for the 273.5, subdivision (a) count, plus a consecutive term of five years on this count for the section 1170.1, subdivision (d) enhancement; (3) a consecutive term of 16 months for the attempted section 273a, subdivision (a) count; (4) a consecutive term of eight months for the attempted section 422 count; (5) a consecutive term of 16 months for the burglary count; and (6) a consecutive term of seven years for enhancements pursuant to sections 667, subdivision (a) and 12022.1.

DISCUSSION

I. EXCLUSION OF EVIDENCE

Armstrong asserts the trial court erred when it excluded evidence related to the removal of the children from Sunshine's custody during trial. The trial court concluded the evidence was inadmissible pursuant to the provisions of Evidence Code section 352.

Sunshine testified during direct examination that her children had been taken away four days before her testimony, and that she believed the reason they were taken away was related to her testimony in this trial. Defense counsel then attempted to elicit from Sunshine how the children were taken from her custody. The prosecution objected, and the trial court dismissed the jury and held a hearing.

Defense counsel advised the court Sunshine would testify that some of the same Madera police officers who testified came to Sunshine's residence, broke down the door, pointed guns at Sunshine and the children, searched the home, and then took the children from Sunshine's custody. He argued these events were attempts to intimidate Sunshine and convince her not to testify.

The prosecutor stated she did not know the children had been removed from Sunshine's custody until so informed by defense counsel during a break in trial a few days before. After being informed, the prosecutor contacted her two primary police witnesses, Foss and Bushey, and both stated they did not know anything about the matter. County counsel called the prosecutor that night and informed the prosecutor there was an ongoing case with MCDSS regarding the children. County counsel said Sunshine and the children returned to live with Armstrong about two or three weeks before they were removed from the home. When MCDSS learned about the change in living arrangements, they obtained a court order to remove the children and asked law enforcement for assistance in doing so. These events were all initiated by MCDSS, not law enforcement or the district attorney's office.

The trial court concluded that from all appearances there was a valid court order to remove the children and therefore, the relevance of these events was clearly outweighed by the tendency to divert the jury's attention from the issues in the case, thus precluding any further inquiry into the matter.

Evidence Code section 352 grants the trial court discretion to exclude relevant evidence if the probative value of the evidence is substantially outweighed by the probability that its admission will (1) necessitate the undue consumption of time, or (2) create substantial danger of undue prejudice, or (3) create substantial danger of confusing the issues, or (4) create substantial danger of misleading the jury. The statute grants the trial court broad discretion in making determinations under section 352. (*People v. Clark* (2011) 52 Cal.4th 856, 893.) We review the rulings of the trial court under the deferential abuse of discretion standard. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) We will interfere with the trial court's ruling only if the record demonstrates the trial court acted in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The proposed testimony was clearly about a collateral matter, i.e., it had no relevance to prove or disprove any issue in the action. (*Rodriguez, supra*, 20 Cal.4th at p. 9.) A collateral matter may be relevant to the credibility of a witness. (*Ibid.*) Defense counsel asserted the removal of the children was relevant to enhance Sunshine's credibility because it demonstrated that she was willing to lose custody of her children in order to "tell the truth."

This argument, however, misreads the record. Sunshine informed the jury that her boys were removed from her custody four days before she testified. Thus, the jury was aware of the fact that Sunshine was willing to place Armstrong's freedom before the well-being of her children. The testimony the trial court excluded related to the circumstances surrounding the removal of Sunshine's children, as well as the reason for that removal. The relevance of this evidence was minimal, and certainly would have consumed significant time if it had been introduced. The prosecutor informed the trial court the children were removed from Sunshine's custody because she and Armstrong were living at the same residence. If Armstrong had been allowed to introduce the evidence related to the removal, the prosecutor would have been permitted to call as many witnesses as necessary to establish the facts requiring removal, and why MCDSS requested police presence when the children were removed. In essence, a mini-trial would have been required to explain why the children were removed, and the circumstances surrounding that removal. Not only would this minimally relevant testimony confuse the issues in the case, it would also result in undue consumption of the trial court's time. The trial court did not err in excluding the evidence.

Nor did the ruling infringe upon Armstrong's constitutional rights. The ruling did not prevent Armstrong from arguing that the children were removed from Sunshine's custody in an attempt to prevent her from testifying. In fact, had the trial court admitted evidence from MCDSS about the circumstances of the removal, such evidence may well have resulted in complete destruction of Sunshine's credibility. It is not difficult to imagine

the dire consequences to Armstrong's case had the jury learned in detail of the apparent tumultuous nature of the relationship between Sunshine and Armstrong from the perspective of MCDSS. Armstrong was permitted to present his defense, which was extremely weak at best. He simply was precluded from presenting collateral testimony with little relevance.

Finally, even were we to assume the trial court erred, Armstrong cannot establish prejudice. We disagree with Armstrong's assertion that the case turned on Sunshine's credibility. *Armstrong's defense* depended on convincing the jury that Sunshine was truthful at trial, but not at every other opportunity. Since Sunshine's injuries were consistent with being attacked, and since the events of April 13 established Armstrong's irrationality and explosive temper, this task was virtually impossible. In addition, all of the independent testimony about both incidents, including Sunshine's refusal to testify in response to the prosecution's subpoena, was inconsistent with Sunshine's trial testimony.

Moreover, Sunshine was permitted to testify the children were removed from her custody four days before she testified, and she believed the reason for their removal was her decision to testify in the case. This testimony by itself was sufficient to show that Sunshine was testifying despite fear that she would lose her children, thus making her testimony more credible than it otherwise would have been. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369, disapproved on a different ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) The additional information sought to be produced by Armstrong would add little to this testimony.

The difficulty with Armstrong's position is that Sunshine had no credibility by the time she testified, and it is difficult to enhance the credibility of someone who has no credibility. Attempting to avoid conviction in this case on the basis of Sunshine's testimony was an act of desperation.⁵ The failure of the tactic was predictable. Since the tactic was

⁵ This is not to suggest defense counsel was ineffective for presenting this defense. The evidence against Armstrong was otherwise overwhelming, and no other possible defense against the charges appears.

doomed to failure, Armstrong cannot demonstrate any prejudice as a result of the trial court's ruling.

II. DENIAL OF MOTION FOR MISTRIAL

In an argument that brings to mind the Shakespeare play *Much Ado About Nothing*, Armstrong asserts the trial court erred when it denied his motion for mistrial related to introduction of pictures of a hammer into evidence.

The pictures were introduced during Foss's testimony. Foss explained that he found the hammer in a flowerbed at the house where he found Sunshine after the attack. Photos of the flower bed and the hammer were admitted into evidence.

On cross-examination, Foss testified the hammer was tested for blood, but he did not know the results of the test. Foss also testified he did not believe there was blood on the head of the hammer. When asked a confusing question about whether he could explain why there was no blood on the head of a hammer purportedly used to strike Sunshine, Foss stated he did not believe the hammer found in the flower bed was the one used by Armstrong to strike Sunshine. Foss explained that when he goes to a crime scene he collects everything that may be of evidentiary value, which in this case included the hammer found at the neighbor's residence.

Defense counsel repeatedly questioned Foss about the hammer, attempting to insinuate that false evidence was being introduced by the prosecution. When asked if the hammer had anything to do with the case, Foss attempted to explain that he thought it was a hammer Sunshine had picked up when she ran out of the house and carried with her to the neighbor's house. Defense counsel objected and a hearing was held outside of the jury.

Defense counsel moved for a mistrial on the grounds of prosecutorial misconduct. He argued the prosecutor had given the impression to the jury that this hammer was the one Armstrong used to strike Sunshine, and the witness failed to explain that in his opinion, it was not the same hammer. He asserted the prosecutor was attempting to deceive the jury.

The prosecutor explained she thought the hammer was the one used during the attack. However, Foss never testified on direct that it was, or was not, the weapon used.

The trial court found there was no attempt to deceive the jury. It appeared to the trial court the prosecutor's belief that the hammer was the one used to attack Sunshine was a mistake. The trial court noted the prosecutor was now left with the challenge of explaining why pictures of an unrelated hammer were introduced into evidence. However, the trial court concluded the prosecutor's mistake was not misconduct, so the motion for a mistrial was denied.

Armstrong asserts the prosecution gained an advantage when it introduced the hammer that resulted in guilty verdicts in a very close case. We disagree. More likely, the introduction of a hammer was an advantage to the defense. Defense counsel apparently understood this fact because, when the jury returned to the courtroom, he immediately returned to the issue of the hammer. Moreover, defense counsel returned to the issue of the hammer numerous times during the remainder of the trial, including closing argument, and even went so far as introducing into evidence the actual hammer.

While one could argue introduction of pictures of the hammer demonstrated a lack of preparation by the prosecutor, it was not misconduct. Introduction of the pictures of the hammer did not aid the prosecution case. The mistake was not deceptive or reprehensible conduct that was used to persuade the jury. (*People v. Williams* (2013) 56 Cal.4th 630, 671.) Nor did the mistake infect the trial with such unfairness as to cause a violation of Armstrong's right to due process, or result in a fundamentally unfair trial. (*Ibid.*) It was simply sloppy trial preparation. Indeed, one could posit the mistake led to the inability to obtain convictions on all counts.

Moreover, there is no possible prejudice as a result of the admission into evidence the pictures of the hammer. Sunshine testified both at the preliminary hearing and at trial that a hammer was involved in the assault. Armstrong never disputed a hammer was used in the assault. Instead, he argued Sunshine attacked him with a hammer. So the fact that a

hammer was introduced into evidence was not surprising, was not misconduct, and was not prejudicial.⁶

III. PROSECUTORIAL MISCONDUCT

Armstrong next claims reversal was required because of the “prosecution’s pattern of pervasive misconduct.” While we referenced prosecutorial misconduct in the preceding section, we now set forth the well-established standard of review.

“““The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” [Citation.]’ [Citation.] [¶] ... [¶]

“Finally, ‘a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion-and on the same ground-the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]’ [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952 (*Stanley*).)

If misconduct has occurred, a defendant must establish it is reasonably probable a result more favorable to him would have been reached absent the misconduct. (*People v. Welch* (1999) 20 Cal.4th 701, 753.) With this law in mind, we now turn to the various claims of misconduct.

Intimidation of Sunshine

Armstrong asserts the prosecution threatened to take custody of the children away from Sunshine if she testified on his behalf. The evidence to support this argument was (1)

⁶ We note, and reject, Armstrong’s reliance on the fact that there are numerous types of hammers. He asserts, apparently, that because of this fact Foss’s descriptions of Sunshine’s injuries as being caused by the round head of a hammer were improper. The record does not contain any evidence about the many types of hammers and the shape of their heads.

having “someone named Justin Day” telling her she would lose her children if she testified, (2) removing the children from her custody four days before her testimony, and (3) law enforcement breaking down her door and removing her children at the request of MCDSS. According to Armstrong, the prosecution’s theory was that the threat of losing custody of her children would convince Sunshine to not testify.

The record does not support this argument. The record does not explain who Justin Day is, and whether he had any relation to the prosecution of the case. Moreover, this issue was not fully litigated so it is impossible to know what was actually said.⁷ It is possible that Day works for MCDSS, and he was warning Sunshine about the possible consequences of committing perjury. However, this conduct cannot be attributed to the prosecutor, especially since the prosecutor informed the court she had no knowledge about these actions, and there is no evidence to refute this representation.

Similarly, removal of her children was unrelated to the prosecution of the case. It appears the reason the children were removed was because MCDSS determined there were grounds to do so pursuant to Welfare and Institutions Code section 300, and the juvenile court agreed by issuing a court order authorizing the removal. Such action is not attributable to the prosecution. Moreover, the prosecution is not responsible for MCDSS’s decision to utilize the help of law enforcement to effect the removal. Accordingly, these acts of alleged intimidation do not suggest any type of prosecutorial misconduct.

The Hammer

Once again, Armstrong asserts that Foss’s testimony about the hammer, and the introduction of pictures of the hammer, constituted misconduct. We have already explained this was not misconduct, and need not repeat this discussion again. We have also explained

⁷ We recognize the issue was not fully litigated because the trial court excluded further testimony on the subject. However, as explained above, this ruling was well within the trial court’s discretion.

that it is not possible Armstrong would have obtained a better result had the hammer not been discussed at trial.

Threat to Arrest Sunshine if She Testified

Prior to Sunshine taking the stand, defense counsel called Sunshine's attorney who testified that during a break, Foss had approached him and stated that if Sunshine testified, she would be arrested for perjury. Foss confirmed that he told Sunshine's attorney that Sunshine would likely be arrested if she committed perjury. Foss asserted he was merely doing this as a courtesy to the attorney, not as an attempt to intimidate Sunshine. He explained he felt obligated to do so because perjury is a serious offense and Sunshine testified under oath to two contradictory descriptions of the events, which constituted perjury.

Telling a defense witness that he or she will be prosecuted for perjury if he or she testifies is prosecutorial misconduct and infringes on a defendant's constitutional rights. (*People v. Hill* (1998) 17 Cal.4th 800, 835, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) We need not decide whether it was prosecutorial misconduct for Foss, the lead investigator in the case, to do so because, as in *Hill*, Armstrong cannot establish any prejudice because Sunshine testified, and she testified in a manner that was very favorable to Armstrong. (*Ibid.*)

Objectionable Direct Examination of Foss

Foss was a less than perfect witness. He appeared anxious to reveal all of the information he knew about the case, including his theories. As a result, during direct examination he constantly volunteered information that was not responsive to the question asked. Armstrong has identified 12 instances during the prosecution's examination of Foss that resulted in sustained objections and the striking of testimony. Nine of those instances were the result of Foss volunteering information. In only three instances could the objection be deemed related to a question posed by the prosecutor.

Armstrong asserts that Foss, as the lead investigator of the case, was part of the prosecution team and, therefore, his repeated efforts to volunteer information constituted prosecutorial misconduct. The only case cited by Armstrong as support for the proposition is *People v. Uribe* (2008) 162 Cal.App.4th 1457 (*Uribe*), which dealt with the failure of the prosecution to disclose evidence, specifically a video of the medical examination of the alleged sexual assault victim. It appears the prosecution was unaware the video existed. The appellate court noted, however, the well-established rule in the context of a *Brady*⁸ error that favorable evidence known to others acting on the government's behalf is imputed to the prosecution. (*Uribe, supra*, at p. 1475.) “‘The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation. [Citation.]’” (*In re Brown* (1998) 17 Cal.4th 873, 879 (*Brown*).)

Armstrong asserts the same theory applies in this case, and the prosecution is responsible for Foss's actions. We are not aware of any authority that supports the concept of a prosecution team in the context of a claim of prosecutorial misconduct. The authority cited by Armstrong is inapplicable. *Uribe* and *Brown* both involved failure to disclose exculpatory evidence as required by *Brady*, which has developed the theory of the prosecution team to prevent prosecutors from withholding evidence by simply leaving it in the possession of law enforcement or some other third party.

Armstrong's argument does not involve an alleged *Brady* violation, nor has he made a reasoned argument to explain why this theory should be expanded to the facts of this case. Nor have we discerned a reason for so doing. Indeed, defense counsel could have simply asked the trial court to admonish the witness to limit his answers to the questions asked. Accordingly, we will not hold the prosecutor responsible for the lead investigator's actions in this case.

⁸ *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

For the same reason, Armstrong's assertions that Foss made denigrating comments about defense counsel must be rejected. We also note, however, that Armstrong's argument does not present a fair assessment of the record. As the trial court noted, defense counsel and Foss both engaged in "combat" during cross-examination, with both parties bearing equal responsibility.

We also note that defense counsel never asserted during trial that prosecutorial misconduct occurred during Foss's testimony. This failure constitutes a second ground for rejecting this argument.

The objectionable questions asked by the prosecutor were limited to three rather minor questions. These questions do not constitute a pattern of conduct so egregious that it infected the trial with unfairness. There was no prosecutorial misconduct.

Closing Argument

First, Armstrong asserts the prosecutor impermissibly vouched for the credibility of its witnesses when she argued, in essence, that the investigating officers were believable because they were trained professionals without a stake in the outcome. While making this argument, the prosecutor named Officer Reyes as one of the investigating officers. Officer Reyes's testimony was stricken after the trial court granted Armstrong's section 1118.1 motion as to two counts and struck all of the testimony related to those two counts. This misstatement leads to the second claim of misconduct during closing argument, the reference to testimony stricken by the trial court.

Armstrong objected to the reference to Reyes, but did not assert the comment constituted misconduct. Accordingly, he cannot raise the issue now.

Even were we to consider the argument on the merits, we would find no misconduct. The brief reference to Reyes, which did not discuss his testimony, was not egregious conduct that infected the trial with unfairness, nor was it deceptive or reprehensible. It was simply a minor error of no import to the issues in the case.

Nor did the prosecutor vouch for the other officers. “A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citation.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness’s truthfulness at trial. [Citation.] However, so long as a prosecutor’s assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the ‘facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,’ her comments cannot be characterized as improper vouching. [Citations.]” (*People v. Fyre* (1998) 18 Cal.4th 894, 971, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The prosecutor did not place the prestige of the government behind its witnesses by personally assuring the jury that these witnesses were truthful. Instead, she explained why the testimony of these witnesses was believable based on the facts in the record and reasonable inferences drawn therefrom, especially when compared to Sunshine whose testimony was incredible. (See, e.g., *People v. Redd* (2010) 48 Cal.4th 691, 740-741.) There is simply no merit to this argument.

Meeting with T.

At the time of trial, T. was living with her grandmother in Arizona. Defense counsel filed a motion in limine attempting to prevent T. from testifying, apparently under the theory the prosecution coerced her into coming to California to testify. The trial court denied the motion after T. testified that she appeared in court willingly and desired to testify.

After the motion was denied, defense counsel convinced the trial court he was entitled to meet with T. and determine if she would submit to an interview. The trial court then ordered a meeting between defense counsel and T. be set up through the probation department at which time T. could agree or refuse to be interviewed. The probation department was to monitor the initial meeting, and if T. agreed to be interviewed, was to provide a meeting room for defense counsel and T.

Four days later, defense counsel informed the court he met with T. for “about five seconds,” apparently inferring that T. refused to be interviewed. Defense counsel complained, however, because T. was accompanied to the meeting by an investigator from the district attorney’s office. He asserted this was a violation of the order of the court. However, he asked for no relief, instead stating “So, I’m just leaving it at that. If we feel it appropriate we’ll bring a motion both in relationship to a jury instruction, in relationship to discovery, we may seek sanctions for a violation of a court order also.”

The prosecutor informed the court that when she explained to the investigator that defense counsel was going to meet with T., the investigator insisted on accompanying T. to the meeting “for her safety and over me telling him what the Court ordered. And I did not tell him to go, he insisted on being there for her safety.”

The court acknowledged its order had apparently been violated, but noted no motion had been made on which it could rule. Defense counsel responded by stating he would be filing a motion. Despite his numerous threats, defense counsel did not file a motion before the verdict was received.

Armstrong asserts these events constituted prosecutorial misconduct. We disagree for a variety of reasons, but need make only three comments. First, the conduct was not a deceptive or reprehensible method designed to persuade the jury since the jury never learned of the incident. Second, Armstrong cannot establish any prejudice by this alleged misconduct. The record demonstrates that T. refused to speak with defense counsel, and we do not have any reason to believe a different result would have been obtained had the investigator been in a different room. As defense counsel and the trial court recognized, T. was not obligated to submit to an interview. Moreover, even if we assume T. would have submitted to an interview had the investigator not been present, there is nothing in the record to suggest the interview would have changed her testimony, or the cross-examination of her would have proceeded differently.

Finally, we note defense counsel could have sought sanctions during trial for the violation, but did not do so. As a result, Armstrong has forfeited any right to assert error on this ground. (*People v. Dowl* (2013) 57 Cal.4th 1079, 1087-1088.)

Foss's Testimony

Armstrong spends several pages demonstrating that Foss was a difficult witness. The entire transcript reveals not only that Foss was a difficult witness, but also that defense counsel was a willing participant in the sparring that occurred between the two. Indeed, the trial court noted that Foss and defense counsel were “getting into kind of a personal combat And one of the problems we’re getting into is that the witness is allowed to explain an answer. A witness can’t be forced to simply answer yes or no if the witness feels an explanation is necessary. But because we’re kind of getting into the combat the explanation now becomes as argumentative as some of the questions. So all I can do is ask that maybe both the officer and [defense counsel] can give a little bit less argument in their questions and answers.”

The prosecutor’s only error, perhaps, was failing to object to the numerous argumentative questions asked by defense counsel. As explained above, she was not responsible for Foss’s behavior, especially when that behavior was, in part, in response to defense counsel’s conduct.

Finally, Armstrong did not assert in the trial court the difficulty he experienced with Foss was prosecutorial misconduct. Failure to do so precludes Armstrong from now raising this argument. (*Stanley, supra*, 39 Cal.4th at pp. 951-952.)

Prosecutor's Facebook Postings

In an incredible display of poor judgment, on the day the trial court ordered the prosecutor to make T. available for an interview with defense counsel at the probation department, approximately one week before voir dire commenced, the prosecutor posted the following comment on her Facebook page:

“After I spent the day trying to prevent my 13 year old star witness from being kidnapped, I found out I am getting the Prosecutor of the Year award from the Victims Service Center. I almost cried when they called and told me.”

While the apparent point of the posting was to inform those viewing the posting that the prosecutor had won an award, the clear implication of the first part of the posting was to suggest there was a plot to kidnap T. Such a suggestion would appear to violate Rule 5-120 of the Rules of Professional Conduct, which prohibits members of the bar from making extrajudicial statements when “the member knows or reasonably should know that [the extrajudicial statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” The prosecutor’s posting had a substantial likelihood of prejudicing the matter if any juror learned of the comment.

The prosecutor’s poor judgment not only appears to have violated rule 5-120, it also created the potential of creating a mistrial and thus wasting valuable government resources. While the prosecutor may not have intended for any juror to read the comment, once something is posted on the internet it is available to anyone with access to a computer. One could imagine the outrage that would result if the prosecutor’s comment were published in a local newspaper. Now consider that a posting on the internet is available to more people than a local newspaper in a magnitude impossible to comprehend. All that is required is for one juror to learn of such comments, either directly or indirectly, to sabotage the entire trial. Common sense, as well as the Rules of Professional Conduct, demand that all attorneys refrain from commenting about ongoing cases in any public forum, especially comments as inflammatory as this one.

The prosecutor’s foolishness, however, was not prosecutorial misconduct entitling Armstrong to a new trial. First, there is no evidence that any juror learned of the comment. Second, misconduct occurs when the prosecutor acts in a deceptive or reprehensible manner to persuade the jury. There is nothing in the record to suggest this comment, however improper, was intended to persuade the jury. Indeed, from all appearances the jury was

never intended to see this comment. Accordingly, the prosecutor's extremely poor judgment will not permit Armstrong a new trial.

IV. CUMULATIVE PREJUDICE

Armstrong asserts the cumulative prejudice suffered as a result of the prosecutor's conduct requires reversal of the judgment. We have identified only one instance of misconduct, and conclude there was no possible prejudice. Accordingly, we also reject the cumulative prejudice argument.

V. SENTENCING

In addition to a consecutive sentence of 16 months for the commercial burglary, the trial court also imposed a two-year consecutive sentence for an enhancement pursuant to section 12022.1, subdivision (b). This section requires the trial court to impose a two-year sentence enhancement when the defendant was on bail at the time he committed the offense. However, subdivision (d) of this section provides that if the defendant is acquitted of the offense for which he was on bail, the enhancement must be stayed.

Armstrong was on bail for events in 2008. He was tried for the 2008 events in this trial, but the trial court entered a judgment of acquittal pursuant to Armstrong's section 1118.1 motion at the conclusion of the prosecution's case. Accordingly, section 12022.1, subdivision (d) required a permanent stay of this enhancement.

Armstrong asks us to strike the enhancement and remand to the trial court to allow it to determine whether to strike the enhancement pursuant to section 1385, or stay it pursuant to section 12022.1, subdivision (d). He cites *People v. Johnson* (2012) 208 Cal.App.4th 1092 as authority for this request. The *Johnson* court vacated the defendant's enhancement and remanded the matter to the trial court so it could impose the enhancement pursuant to *People v. Meloney* (2003) 30 Cal.4th 1145, 1165 (*Meloney*). (*Johnson, supra*, at pp. 1100-1101.) However, *Meloney* remanded for a new sentencing hearing at which the enhancement could either be stayed or stricken because the trial court did not believe it had

discretion to strike the section 12022.1, subdivision (b) enhancement pursuant to the provisions of section 1385. (*Meloney* at p. 1165.)

Unlike *Meloney*, there is no indication the trial court did not understand it had discretion pursuant to section 1385 to strike the section 12022.1, subdivision (b) enhancement. Indeed, *Meloney*, which was decided in 2003, specifically held a trial court has such discretion. (*Meloney, supra*, 30 Cal.4th at pp. 1154-1157.) Therefore, there are no grounds to remand the matter to the trial court to permit it to exercise its discretion. Since in this situation subdivision (d) of section 12022.1 applies, we will order a permanent stay of the enhancement.

DISPOSITION

The two-year enhancement imposed pursuant to section 12022.1, subdivision (b) is ordered permanently stayed. The judgment is affirmed in all other respects. The matter is remanded to the trial court for issuance of a new abstract of judgment.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Poochigian, J.